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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 80

PAN AMERICAN PETROLEUM CORPORATION, a Delaware Corporation,
Petitioner,
v.
THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY, and THE HONORABLE ANDREW D. CHRISTIE sitting as a Judge of That Court, and CITIES SERVICE GAS COMPANY, a Delaware Corporation,
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TEXACO, INC., a Delaware Corporation,
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Respondents,
and
CITIES SERVICE GAS COMPANY, a Delaware Corporation,
Intervening Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

MOTION OF ATCHISON, CHANUTE, CHERRYVALE, ERIE, GIRARD, GRENOLA, HOWARD, ALL BEING POLITICAL SUBDIVISIONS OF THE STATE OF KANSAS, AND CARTHAGE, CLINTON, CARL JUNCTION, JOPLIN, MARSHALL, NEOSHO, NEVADA, ORONOGO, PIERCE CITY, PLATTE CITY, ST. JOSEPH, SPRINGFIELD, WAVERLY, WEBB CITY, KANSAS CITY AND INDEPENDENCE, ALL BEING POLITICAL SUBDIVISIONS OF THE STATE OF MISSOURI, FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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The municipalities which are the Movants are political subdivisions of the States of Kansas and Missouri and the brief *amici curiae* is sponsored by the respective

law officers of each of the municipalities, and therefore, submitted and filed as a matter of right under Rule 42 (4). However, the municipalities out of an abundance of caution file this Motion for leave to file their brief *amici curiae* and set forth their interest and reason for the participation of the municipalities.

The municipalities are located in the States of Kansas and Missouri. Each is served by a natural gas distribution system which purchases natural gas from Respondent Cities Service Gas Company (Cities Service) for resale to the residents of the municipalities.[1] The rates paid to Cities Service by such distribution systems for natural gas determines, in large measure, the rates which are paid for the natural gas by the residents of the municipalities. In turn, the natural gas rates charged by Cities Service are substantially determined by the cost to it of gas purchased from natural gas producers including Petitioners. In the event Cities Service receives the $10,436,000.00 (R. 237, 58) sued for, the municipalities served with gas through various distributors served by Cities Service and their resident gas consumers will be entitled to and will receive over $7,000,000.00 in refunds (FPC Docket G-2410, R. 556-586) from Cities Service, of which these municipalities and their citizens will receive the larger part.

Since September 23, 1954, the rates which have been paid by the distributors of gas in the municipalities to Cities Service have been those fixed pursuant to an Order

[1] In the case of the municipalities of Chanute, Kansas; Howard, Kansas; Oronogo, Missouri; and Springfield, Missouri, gas is distributed in such cities by a distribution system owned by the named municipalities. In the other named municipalities, gas is distributed to the residents of the city by privately owned distribution companies, which companies are customers of Cities Service Gas Company.

of the Federal Power Commission in FPC Docket G-2410, issued May 25, 1956 (R. 556, *et seq.*), approving a settlement of litigation which had been commenced before the Federal Power Commission by Cities Service's Application for increased rates, filed on May 23, 1954. The municipalities were active participants in this litigation. It appeared in the litigation that one of the important elements in the establishment of the rate was the cost to Cities Service of gas purchased in the Kansas-Hugoton Field.

All of the gas purchased in the Kansas-Hugoton Field was contracted for by Cities Service with producers, including Petitioners Pan American Petroleum Corporation and Texaco, Inc., under long-term contracts providing for fixed prices. The price in the gas purchase contracts between Cities Service and the Petitioners herein was approximately 8.4¢ per Mcf at 16.4= p.s.i.a. Notwithstanding these contractual prices and arrangements, the Kansas Corporation Commission issued its Order, effective January 1, 1954, requiring the payment of 11¢ per Mcf at 14.65= p.s.i.a. for all gas purchased in the Kansas-Hugoton Field (R. 261). Cities Service timely challenged the validity of this Kansas Minimum Price Order and perfected proceedings for its judicial review. This judicial review proceeding was still pending in the Courts of the State of Kansas, on May 23, 1956, when Cities Service's rate case settlement in FPC Docket G-2410 was approved by the Federal Power Commission and it was undetermined whether the cost to Cities Service for gas produced in the Kansas-Hugoton Field was the state-fixed price of 11¢ at 14.65= p.s.i.a. (if the Kansas Minimum Price Order were ultimately determined to be valid), or was the lower gas

purchase contract price of 8.4¢ at 16.4# p.s.i.a. (if the Kansas Minimum Price Order were ultimately determined to be void).

In recognition of this undetermined effect of the Kansas Minimum Price Order upon Cities Service's gas purchase costs, the Federal Power Commission, in approving the settlement of Cities Service's rate case, approved rates based on the ordered price but provided that refunds which it received on account of the Order's invalidity should be passed on to its jurisdictional customers in accordance with the formula set out in the settlement order (R. 571-573).

On January 20, 1958, in *Cities Service Gas Company* v. *Kansas Corporation Commission*, 355 U.S. 391, this Court held that the Kansas Corporation Commission's Minimum Price Order was void. Shortly thereafter, Cities Service commenced these cases and similar cases against other producers to collect the refunds of overpayments which it had made to producers in the Kansas-Hugoton Field during the pendency of litigation challenging the validity of the Order.

Several of these refund cases have been concluded and substantial amounts in refunds have been received by Cities Service. To date, approximately $1,736,076.00 of these refunds have been distributed by Cities Service to its customers, including the distributors serving these municipalities. The Kansas Corporation Commission and the Missouri Public Service Commission have actively participated in providing for the further distribution of such refunds to the ultimate consumers of natural gas.

Amici Curiae are aware that these cases involve only the review of the judgment of the Superior Court of Delaware denying the Petitioners' Application for a Writ of Prohibition to the trial court in which Cities Service's cases were commenced, and do not concern the merits of Cities Service's action for refund, but only the jurisdiction of the Superior Court of New Castle County to hear and determine the cases in the first instance. However, they fear that if the Petitioner's position that the state court has no jurisdiction in the instant case is upheld, their right to refunds under FPC Order G-2410 will become the classic example of a right without a remedy because every Federal court to which similar claims have been presented has denied jurisdiction: *e.g.*, *Cities Service Gas Co.* v. *Skelly Oil Co.*, 165 F. Supp. 31 (D.C. Del., 1958), and the Federal Power Commission has determined that it is neither necessary nor appropriate for the Commission to determine the effective rate for sales to Cities Service from the Kansas-Hugoton Field during the period in question (Pan American Petroleum Corporation, Federal Power Commission Docket No. G-4904, Order December 1, 1960).

WHEREFORE, the municipalities being vitally concerned, pray their Motion for Leave to File the attached *Brief Amici Curiae* in support of Respondents be granted.

Respectfully submitted.

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Attorneys for Amici Curiae.

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OPINIONS BELOW

The opinion of the Superior Court of Delaware in and for New Castle County (R. 8-21) is reported at 155 A.2d

879. The opinión of the Supreme Court of Delaware (R. 33-46) is reported at 158 A.2d 478.

JURISDICTION

The jurisdictional requisites are set forth in the Petition for *Certiorari*. *Certiorari* was granted by this Court on June 13, 1960. This brief is filed by the aforementioned cities as *amici curiae* in accordance with paragraph (4) of Rule 42, being presented by political subdivisions of the States of Kansas and Missouri, who are, or whose residents are, jurisdictional customers of Respondent Cities Service Gas Company and have an interest in the refunds sued for under an order of the Federal Power Commission (See *In re Cities Service Gas Company*, 15 F.P.C. 1448, 1453-58), and is sponsored by the authorized law officers of such political subdivisions.

QUESTION PRESENTED

Whether a State Court is precluded by Section 22 of the Natural Gas Act from exercising jurisdiction in actions based on common-law theories to recover payments for gas in excess of the agreed contract price for such gas because Defendant alleges, among other defenses, a defense based on the Natural Gas Act.

STATUTE INVOLVED

The provision of the Federal statute involved is Section 22 of the Natural Gas Act, 52 Stat. 833 (1938), 15 U.S.C. 717 (u). The portion of said statute involved herein reads as follows:

"The District Courts of the United States, the District Court of the United States for the District of Columbia, and the United States Courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law, brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation or order thereunder. * * *"

STATEMENT

The interest of these *amici curiae* in this proceeding arises out of the rights of the cities of Altamont and Howard, Kansas and the City of Springfield, Missouri, to refunds of a portion of the money sought to be obtained by Cities Service Gas Company as a result of this litigation, in accordance with the May 25, 1956 order of the Federal Power Commission entered in *In re Cities Service Gas Company*, 15 F.P.C. 1448, 1453-58, and of the interests of the ratepayers, citizens of the other named cities, in the refunds to be made to the private utilities serving such cities in accordance with said order as set forth in their Motion for Leave to File Brief in Support of Respondents. The *amici curiae* adopt the statement appearing in the brief of the Respondent Cities Service Gas Company.

SUMMARY OF ARGUMENT

The sole issue before this Court is whether the state trial court has jurisdiction to hear and determine the issues in these cases. In the trial court, the Plaintiff Cities Service stated its cause of action on common-law theories of contract, unjust enrichment and restitution as admitted

in the petitions for Writs of *Certiorari* filed in this Court. The Defendants pleaded, among other defenses, that the filing of their gas rate schedules, including their contracts with the Plaintiff, with the Federal Power Commission committed exclusive jurisdiction over these cases to the Federal Courts under Section 22 of the Natural Gas Act. The allegations of Plaintiff's complaint are the test of jurisdiction and as, admittedly, they state a common-law cause of action, jurisdiction is laid in the state courts, regardless of the allegations of Defendant's answer attempting to inject questions of federal law into the litigation via their "filed rate" defense.

The rights of Cities Service against these petitioners arise out of their common law contracts with petitioners which, subject to the requirements for notice by filing with the Federal Power Commission, are not affected by the Natural Gas Act, as this Court recognized in *Mobile*.[1] As natural gas companies are still as free to enter into rate contracts as they were before the adoption of the Act, the interpretation of such contracts is a matter of contract law which may properly be determined by state courts. Section 22 of the Natural Gas Act applies only to suits brought to enforce liabilities created by the Act or regulations of the Federal Power Commission. It has no application to cases where the action is a common-law one arising out of an initial rate established by contract alone with respect to which there has been no action of the Commission under Section 5(a) of the Act.

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[1] *United Gas Pipe Line Co. v. Mobile Gas Service Corporation*, 350 U.S. 332 (1956).

The Petitioners' argument that a judgment for the Plaintiff in the trial court would be contrary to their filed rate schedules and therefore the trial court is without jurisdiction confuses jurisdiction to enter a judgment with the merits of such judgment, which latter question is not presently before this Court. The trial court if it has jurisdiction to enter any judgment has jurisdiction to enter either a correct or an erroneous judgment, subject to review. The Petitioners also confuse the contract or initial rate filed with the Federal Power Commission with such rate as modified by the invalid Kansas Minimum Price Order which, after being struck down by this Court, could have no effect on the contract or initial rates. A judgment for Plaintiffs in this case would involve neither a collateral attack on the contract nor filed rate schedule nor the determination of a reasonable rate but only the determination of what is the common-law contract rate filed by the Petitioners, which is unaffected by the Natural Gas Act.

Petitioners herein, recognizing that the Federal Power Commission will not determine the effective rate[2] or require the refunds to be made to Cities Service because it has no reparations power and that every Federal District Court presented with the question has held that Federal Courts do not have jurisdiction of claims such as Cities

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[2] *Socony Mobil Oil Company, Inc.*, Federal Power Commission Docket No. G-16717, Order Denying Petition for Determination of Effective Rate, November 22, 1960, and Order Denying Application for Rehearing, January 24, 1961; *Pan American Petroleum Corporation*, Federal Power Commission Docket No. G-4904, Order December 1, 1960, printed in Appendix.

Service is making in these cases,[3] seek to retain moneys which they collected by authority of a law held invalid by this Court,[4] by attacking the jurisdiction of the state court to adjudicate Cities Service's rights to a refund of such moneys and thus depriving Cities of any tribunal in which its claims may be adjudicated. If the jurisdiction of the state court to determine such purely common-law rights is not affirmed, Petitioners will have succeeded in unjustly enriching themselves by retaining a windfall of the vast sums collected by them solely under the authority of a void law at the cost not only of Cities Service but of each of the *amici curiae*.

ARGUMENT

I.

State courts have jurisdiction to determine Federal Questions raised defensively.

The suits of the Plaintiff, Cities Service, were brought to enforce common-law liabilities for restitution, unjust enrichment and upon a contract and it has been recognized by all parties during the entire course of this litigation that the Plaintiff's complaints stated only causes of action to enforce such common-law liabilities. See: Pan American's petition for Writ of *Certiorari*, pages 3-8; Pan American's brief in the trial court (R. 616); Texaco's petition for Writ of *Certiorari*, pages 2, 5 and 6; Texaco's brief

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[3] *Cities Service Gas Co.* v. *Skelly Oil Co.*, 165 F. Supp. 31 (D.C. Del., 1958); *Northern Natural Gas Co.* v. *Cities Service Oil Co.*, 182 F. Supp. 155 (D.C. Iowa, 1959); *Pan American Petroleum Corp.* v. *Cities Service Gas Co.*, 182 F. Supp. 439 (D.C. Kan., 1959).

[4] *Cities Service Gas Company* v. *State Corporation Commission*, 355 U.S. 391 (1958).

in the trial court (R. 230); Defendants' Motions for Summary Judgment (R. 170, 656). The Defendants, among other defenses, pleaded their "filed rate schedules" under the Natural Gas Act and now contend that by the raising of such defenses the state court was ousted of jurisdiction by Section 22 of the Natural Gas Act which gives exclusive jurisdiction to the Federal Courts in suits arising out of the Act. The record and the decided cases clearly indicate that these suits did not arise out of the Natural Gas Act but rather only that the Petitioners' defenses are based on said Act.

The Congress and this Court have consistently accepted state courts as proper tribunals for the determination of federal questions injected into cases as a matter of defense.

As Justice Cardozo said in *Gully* v. *First National Bank in Meridian*, 299 U.S. 109 (1936), "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." It has long been recognized that federal jurisdiction does not exist unless it appears from the outset from the declaration of the party suing that the suit depends on some question of a federal nature, *Metcalf* v. *City of Watertown*, 128 U.S. 586, (1888); and that state courts have jurisdiction to determine federal questions raised as a matter of defense, *Pratt* v. *Paris Gaslight and Coke Co.*, 168 U.S. 255 (1897); *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U.S. 473 (1912); *State of Arkansas* v. *Kansas & Texas Coal Co.*, 183 U.S. 185 (1901); annotation in 167 A.L.R. 1114; *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950). The single test of jurisdiction is the allegation of the plaintiff's com-

plaint, *Henry* v. *A. B. Dick Co.*, 234 U.S. 1, 16 (1912); *Taylor* v. *Anderson*, 234 U.S. 74, 75 (1914). The defense of illegality under the anti-trust law has been held to be adjudicable by a state court in an action for breach of contract, *E. Bemont & Sons* v. *National Harrow*, 186 U.S. 70 (1902). State courts have been held to have jurisdiction of actions to enforce contracts in which the subject is a patent despite the exclusive jurisdiction given federal courts of civil actions arising under any act of Congress relating to patents, *Henry* v. *A. B. Dick Co.*, *supra*. By analogy state courts may properly assume jurisdiction in a contract action where the defense raises a question of the validity or applicability of the rate provisions of a contract under a federal statute.

The argument raised by the petitioners that the exercise of jurisdiction by state courts to determine such federal questions involved herein destroy uniformity in the construction of the Natural Gas Act was conclusively rejected in *Great Northern Ry.* v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922), wherein this Court pointed out that if the parties properly preserve their rights, a construction given by any court either state or federal may be ultimately reviewed by this Court either on writ of error or writ of *certiorari* and uniformity in construction thereby secured.

II.

The Respondent's suit is not one to enforce a liability or duty created by the Natural Gas Act with respect to which the Federal Courts have exclusive jurisdiction under Section 22 of the Act.

Section 22 of the Natural Gas Act preserves exclusive jurisdiction to the Federal Courts only of "'all suits in equity and action at law brought to enforce any liability or duty created by, or to impair any violation of, this chapter or any rule, regulation or order thereunder." The test of such exclusive jurisdiction simply stated is whether the action is to enforce a liability or duty created by the Natural Gas Act.

Petitioners erroneously contend that their filing with the Federal Power Commission in accordance with requirement for notice by filing of Section 4(c) of the Natural Gas Act, of the rates established by their contracts with Cities Service on which these suits were brought, transmuted Cities Service's rights under such contracts into rights and liabilities arising under the Natural Gas Act which are adjudicable only in Federal Courts. Such contention misconstrues and misapplies the prior decisions of this Court.

This Court in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956) determined at the outset that the Natural Gas Act in marked contrast to the Interstate Commerce Act, on decisions with respect to which Petitioners so often rely, does not abrogate private rate contracts as such and decided that, subject to the requirements for notice by filing with the Commission,

such contracts are valid and binding and cannot be changed unilaterally by a party to the contract. It is submitted that this Court recognized that the Act provides no procedure for establishing or enforcing initial rates but only for notice to the Commission of the setting of such rates and for review of the reasonableness thereof under Section 5(a). This Court stated at page 343:

> "All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the power of the Commission to review rates set initially by natural gas companies and there is nothing to indicate that they were intended to do more. * * * The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act; to establish ex parte and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rates agreed on with a particular customer."

If, as this Court said, all of the relevant provisions of the Act simply define and implement the power of the Commission to review rates, the exclusive jurisdiction provision of Section 22, cannot be interpreted to preclude state courts from exercising jurisdiction over actions arising out of contracts unimpaired by the Act but merely filed with the Commission where, as in these cases, there has been no exercise by the Commission of its powers to review the reasonableness of such rates under Section 5(a). In *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), this over-all concept of the unimpairment of common-law contracts unre-

viewed under Section 5(a) expressed in *Mobile*, was affirmed when petitioner was allowed to assert its right to unilaterally change rates where such right had been specifically secured to it by its initial rate contract filed with the Commission. And affirmed again in *Atlantic Refining Co., Cities Service Production Company, Continental Oil Company, et al.* v. *Public Service Commission of State of New York (Catco)*, 360 U.S. 379 (1959), where this Court premised its decision on the fundamental principle of law that the Federal Power Commission is powerless to change prices fixed by filed contract except by review under Section 5(a) of the Natural Gas Act.

The rationale of *Mobile*, *Memphis* and *Catco* makes it clear that in the absence of a review proceeding under Section 5(a) the relationship between the parties is that established by their contracts and the filing and notice requirement of the Natural Gas Act does not in any way affect the rights of the parties by virtue of such contracts. Therefore, where the Commission has not exercised its review jurisdiction under Section 5(a) to set aside or modify such contract rights of the parties which initially derive from state law such rights retain their contractual nature, determinable in the state courts and cannot become liabilities or duties created by the Natural Gas Act, adjudication of which is reserved to the Federal Courts, solely because of the filing of the contracts with the Commission. Nothing the Commission does with respect to an initial rate filing can have any effect on the rates fixed by the contract filed. The jurisdiction to determine the duties and liabilities existing between petitioners and respond-

ents by virtue of such contracts and the unimpaired operation of common law must remain in the common-law forum, the state courts.

The Petitioners attempt to limit this Court's decision in *Mobile* to hold only that where a fixed rate contract exists, the unilateral filing of a change in rate may be set aside solely by timely protest before the Commission and judicial review in which such unilateral change of rate is required to be rejected. Such interpretation reduces the contract rights which this Court said are not impaired by the Natural Gas Act to a mere right to protest a rate change which exists in any event under the Act and ignores the entire rationale of this Court's opinion in *Mobile* and its specific language on pages 339 and 340:

> "Absent the Act, a unilateral announcement of a change to a contract would, of course, be a futility, and we find no basis in the language of Sec. 4(d) for inferring that the mere imposition of the filing and notice requirement was intended to make effective action which would otherwise be of no effect at all. In short, Sec. 4(d) on its face indicates no more than that otherwise valid changes cannot be put into effect without giving the required notice to the Commission."

Petitioners in relying on *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), and *T.I.M.E. Incorporated* v. *United States*, 359 U.S. 464 (1959), as supporting their contention that the acceptance for filing by the Commission of the invalid Kansas Minimum Price Order operated to fix an initial rate different from the contract rate, misconceives these decisions in which an attack was made on the reasonableness of the

filed rate which this Court properly held could not be done in the courts in the first instance. Cities Service in the instant cases is not seeking to attack the reasonableness of the filed or contract rates. The holdings in these cases that the reasonableness of a rate is not to be determined by the courts does not in any way militate against the contention of Cities Service and *amici curiae* that under the Natural Gas Act the initial establishment of rates is within the exclusive control of the contracting parties and the determination thereof within the jurisdiction of the courts of the state whose laws govern such contracts.

That actions arising out of contracts with respect to gas rates are not actions arising under the Natural Gas Act even though their determination required an interpretation of the Act and the actions of the Federal Power Commission, was clearly perceived by both the majority and the dissenting opinions of this Court in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). This Court plainly held (at p. 672) that suits for damages or for specific performances of gas contracts were not assertions of federal rights for the simple reason that such suits would "arise" under the state law governing the contracts. Justices Vinson and Burton in their dissent even doubted there was a federal question presented at all even though interpretation of the contract between the parties required an interpretation of a federal statute and the action of a federal regulatory body. Surely a suit to collect an overpayment, or in restitution on unjust enrichment arising out of such contract is one arising under state law governing contracts, adjudicable in state courts.

The Federal Courts which have refused to remove state court actions based on such contracts have accepted the principle that suits based on gas rate contracts do not arise out of the Natural Gas Act in *Cities Service Gas Co. v. Skelly Oil Co.*, 165 F. Supp. 31 (D.C. Del. 1958); *Northern Natural Gas Co.* v. *Cities Service Oil Co.*, 182 F. Supp. 155 (D.C. Iowa 1959); *Pan American Petroleum Corporation* v. *Cities Service Gas Co.*, 182 F. Supp. 459 (D.C. Kansas 1959); and in *Natural Gas Pipeline Co.* v. *Harrington*, 246 F.2d 915, 5th Cir. 1957, *cert. denied*, 356 U.S. 957 (1958); wherein the Circuit Court though accepting federal jurisdiction on the ground of diversity of citizenship, clearly recognized that an action for the restitution of the difference between contract rates for the purchase of gas and the price paid under an invalid minimum rate order of the State Corporation Commission of Oklahoma, was founded not on the Natural Gas Act but on common-law principles of restitution of charges exacted in excess of the contract rates.

The absence of any provision in the Natural Gas Act specifically authorizing suits to recover overpayments of gas rates, such as found in the Interstate Commerce Act, further negates the contention that such suits are suits to enforce a duty or liability created by the Act.

III.

The trial court merely determined and applied the legally effective rate and neither established a rate nor adjudicated the reasonableness thereof.

Although the correctness of the decisions of the trial court is not before this Court at this time, Petitioners nevertheless argue that the trial court lacked jurisdiction because contrary to the decision in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), it adjudicated and applied as a legal rate one different from that on file with the Commission. This, of course, is not so. It neither adjudicated a rate nor determined a filed rate to be unreasonable. It merely determined what was the initial contract rate filed by the petitioners. The Petitioners in so contending erroneously assume that the Commission's acceptance for filing of the Kansas Minimum Price Order together with the contracts with Cities Service Gas Company and, in the case of Petitioner, Texaco, of the refund contract sued on, established the Kansas Minimum Price Order as the legally effective rate protected from any change by any court by the decision in *Montana-Dakota*. Such assumption is a brazen effort to revive the Kansas Minimum Price Order declared by this Court to be invalid in *Cities Service Gas Company* v. *State Corporation Commission*, 355 U.S. 391 (1958), and thereafter held to have been void *ab initio* by the Kansas Supreme Court in *Cities Service Gas Company* v. *Kansas Corporation Commission*, 184 Kan. 540, 337 P.2d 640 (1959), *cert. denied* 361 U.S. 836 (1959).

This specious argument of the Petitioners was recognized as such and struck down by the Tenth Circuit Court of Appeals in *Cities Service Gas Company* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir., 1958), *cert. den.*, 358 U.S. 837 (1958). The Court there pointed out that a natural gas purchaser having paid the Kansas ordered rate while suing to have it declared invalid is in no worse position than the consumer in *Mobile* which was aggrieved by the filing of a unilaterally increased rate initiated by its producer, since the Act abrogates none of the usual contract rights except for the Commission's review powers on hearing and held that when this Court invalidated the Kansas Minimum Price Order there was no longer any legal order which could modify the contract rate and that therefore the contract rate was the effectively filed rate. See also: *Natural Gas Pipe Line Company of America* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir., 1958), *cert. den.*, 357 U.S. 44 (1958).

The trial court did not presume to determine the reasonableness of the rate filed, recognizing that under *Montana-Dakota* the jurisdiction of the Commission to do so is exclusive. It merely determined that subsequent to this Court's invalidation of the Kansas Minimum Price Order, the filed rates protected by *Montana-Dakota* were the contract rates filed with the Commission unchanged by the void Kansas Minimum Price Order, which contract rates under *Mobile* could not be varied by any act of the Commission except modification after a hearing and finding of unlawfulness under Section 5(a). The Supreme Court of Delaware held merely that the trial court is competent to in-

terpret the federal law and determine what were the filed rates when urged as a defense to an action based on such rights. This is in accord with the opinion of this Court in *Great Northern Ry.* v. *Merchant's Elevator Co.*, 259 U.S. 285 (1922).

CONCLUSION

The order of the Federal Power Commission (15 F.P.C. 1448, 1454-6) was entered to protect *amici curiae* and to assure them and their citizen gas users of the advantage of the contract rates between Petitioners and Respondent Cities Service Gas Company; such order recognizing the validity of the contract rates should the Kansas Minimum Price Order be held invalid in the then pending litigation which resulted in this Court holding such Kansas Minimum Price Order invalid. As the Natural Gas Act does not abrogate private contracts and natural gas companies may set rates by contract, state courts have jurisdiction to entertain common-law causes of action based on such contracts and may determine and apply in such causes of action the rates established by contract, interpreting federal law to determine federal questions raised defensively or incidental to the cause of action presented by the petition filed in the state court. *Amici curiae* submit that to hold otherwise would deprive them of their rights to refunds from Cities Service Gas Company assured them by Federal Power Commission order, and give to the Petitioners herein a windfall in the amount of $10,760,000 largely at the expense of *amici curiae* and their hundreds of thousands of rate-

payers by assuring to Petitioners the retention of a price which this Court has already held to have been illegal from its very inception. The judgment of the Supreme Court of Delaware is in accord with the decisions of this Court and should be affirmed.

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Socony Mobil Oil Company, Inc.)
(formerly Magnolia Petroleum)
Company))

ORDER DENYING PETITION FOR DETERMINATION OF EFFECTIVE RATE

(Issued November 22, 1960)

On October 20, 1958, Magnolia Petroleum Company, now merged into Socony Mobil Oil Company, Inc., and hereinafter referred to as Socony Mobil, filed a petition with the Commission requesting that we enter on a hearing to determine what was its effective rate on June 7, 1954, for the sale of gas to Cities Service Gas Company (Cities Service) from the Hugoton Field, Kansas, and issue a declaratory order stating the same. Alternatively, Socony Mobil requests that the Commission on its own motion institute a hearing under Section 5(a) of the Natural Gas Act (Act) to determine the just and reasonable rate for the sale to Cities Service. The sale in question is made under Socony Mobil's FPC Gas Rate Schedule No. 3.[1]

The facts disclose that on February 19, 1957, Socony Mobil tendered for filing with the Commission its gas sales contract dated June 17, 1946, covering the aforesaid sale of gas to Cities Service. This contract, which was for a 20-

[1] Formerly designated Magnolia Petroleum Company FPC Gas Rate Schedule No. 3.

year term, called for a price of 6 cents per Mcf initially (16.4 pounds psia). Concurrently, Socony Mobil tendered for filing with the Commission certain supplements to the contract, including a copy of an order issued on December 2, 1953, by the State Corporation Commission of Kansas, providing for a minimum price for gas at the wellhead in the Hugoton Field of 11 cents per Mcf (14.65 pounds psia). By order issued May 17, 1957, we accepted for filing this contract and the supplements thereto. Cities Service sought judicial review of the Commission's action accepting this Kansas minimum price order as part of Socony Mobil's Rate Schedule, and the court, finding that the Kansas order had been held invalid by the Supreme Court in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 355 U.S. 391, reversed the Commission and remanded the cause with directions to the Commission to strike the aforesaid Supplement No. 26 from its files. *Cities Service Gas Company* v. *F.P.C.*, 255 F.2d 860, *cert.* den., 358 U.S. 837.

In accordance with the court's directions, by letter to Socony Mobil dated October 12, 1960, the Commission advised Socony Mobil that Supplement No. 26 had been stricken from the files of the Commission and returned the supplement to the company. Socony Mobil has returned to the Commission our letter and the stricken supplement, stating that in view of the pendency of the instant proceeding, our striking of the supplement was "premature."

As grounds for its request that we determine the rate for the sale to Cities Service, Socony Mobil contends that the Commission's action striking Supplement No. 26 from its file will not remove the uncertainty as to the rate in effect on June 7, 1954, for this sale. The company contends that the Commission has recognized in Docket No. R-168[2]

[2] Docket No. R-168 involves a rule-making proceeding we instituted by notice issued April 28, 1958, for determining whether to amend our Regulations under the Natural Gas Act or take some other action in the light of the Supreme Court's reversal of the State minimum price orders.

that many questions must be determined in view of the Supreme Court's decision in *Cities Service Gas Company* v. *State Corporation Commission of Kansas*, 355 U.S. 391, declaring invalid the Kansas minimum price order. The company argues that a pending declaratory action in the United States District Court for the District of Kansas makes it imperative that the Commission determine the issue of its effective rate schedule. It further contends that under *Phillips Petroleum Co.* v. *F.P.C.*, 258 F.2d 906, it is entitled to a hearing to determine its effective rate on June 7, 1954, since this matter was never determined by the Commission or the courts. And it asserts that in view of Cities Service's voluntary payment of the 11-cent price and other circumstances, that company is estopped from contending that the amounts due under Rate Schedule No. 3 on and after June 7, 1954, are at the rate of 6 cents as originally provided in the contract.

Cities Service on November 28, 1958, filed a motion to dismiss or reject Socony Mobil's petition, contending that the action pending in the District Court in Kansas involves substantially the same subject matter involved herein and the court has exclusive jurisdiction to determine such matters; that the Commission is without jurisdiction to determine the legal questions which are involved in this proceeding; and that there is no uncertainty or ambiguity as to the filed rate here concerned.

We conclude that Socony Mobil's petition should be denied. Furthermore, the decision of the court in the Cities Service case in 255 F.2d 860, *supra*, is explicit that we must strike the Kansas order, Supplement No. 26 from our files, and this action we have already taken. In addition, as indicated above, litigation is pending in the United States District Court in Kansas respecting the controversy between Socony Mobil and Cities Service arising from the invalidation of the Kansas minimum price order. In view of these

circumstances, it is neither necessary nor appropriate for us, at least at this time, to undertake to determine the rate for this sale.

Socony Mobil's Supplement No. 26 returned to the Commission by Socony Mobil shall be returned to the company.

The Commission orders:

Socony Mobil's petition for determination of its effective rate to Cities Service, filed in this proceeding on October 20, 1958, is hereby denied.

By the Commission.

/s/ J. H. Gutride
Joseph H. Gutride,
Secretary.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Socony Mobil Oil Company, Inc. (formerly Magnolia Petroleum Company)	)	Docket No. G-16717

ORDER DENYING APPLICATION FOR REHEARING
(Issued January 24, 1961)

On December 20, 1960, Socony Mobil Oil Company, Inc., filed an application for rehearing of the Commission's order issued herein on November 22, 1960, denying its petition for determination of the effective rate on June 7, 1954, for the sale of gas to Cities Service Gas Company from the Hugoton Field, Kansas. The Kansas minimum price orders having been held invalid by the United States Supreme Court, dispute has arisen between these two companies as to the correct price for this sale. In our order of which rehearing is sought, we pointed out that we have stricken the invalid Kansas order from our files, in accordance with judicial instructions. We further pointed out that litigation is pending in the United States District Court in Kansas respecting the controversy between Socony Mobil and Cities Service arising from the invalidation of the Kansas order. Accordingly, we held that it is neither necessary or appropriate for the Commission, at least at this time, to undertake to determine the rate for this sale. These reasons are still sound and we adhere to this decision.

The Commission further finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed herein on December 20, 1960, by Socony Mobil Oil Company, Inc., set forth no new facts or principles of law which were not fully considered by the Commission when it issued its order of November 22, 1960, or which, having now been considered, warrant any change in or modification of the said order.

The Commission orders:

The application for rehearing of the Commission's order issued November 22, 1960, filed herein by Socony Mobil Oil Company, Inc., on December 20, 1960, is hereby denied.

By the Commission.

/s/ J. H. Gutride
Joseph H. Gutride,
Secretary.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, Arthur Kline and Paul A. Sweeney.

Pan American Petroleum Corporation (formerly Stanolind Oil and Gas Company)	Docket No. G-4904

ORDER ISSUING CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, AND GRANTING IN PART AND DENYING IN PART APPEAL AND MOTIONS

(Issued December 1, 1960)

This proceeding involves an application filed by Pan American Petroleum Corporation (Pan American)[1] for a certificate of public convenience and necessity under subsections (c) and (e) of Section 7 of the Natural Gas Act (Act) authorizing the sale of natural gas to Cities Service Gas Company (Cities Service). The case is now before us by virtue of an appeal by Pan American from certain rulings of the presiding examiner at the hearing. The company's appeal, which was filed on November 10, 1958, is accompanied by motions that we order the record certified to the Commission, reverse certain rulings by the examiner, grant a continuance, and specify the issues to be heard. For the reasons hereinafter set forth, we are granting the motion that the record be certified to the Commission; and on the basis of the record, we are reversing the examiner's rulings complained of and shall hereinafter issue to Pan

[1] At the time the filing was made, the company's name was Stanolind Oil and Gas Company, the change to Pan American was made on February 1, 1957.

American a certificate of public convenience and necessity. In the light of this action, Pan American's other requests shall be denied.

The sale to Cities Service covered by Pan American's certificate application, which was filed with the Commission on November 16, 1954, is of gas from the Hugoton Field in Kansas.[2] In accordance with the Commission's Regulations, Pan American filed with its application a copy of its gas sales contract with Cities Service. The contract, which was dated June 23, 1950, and which was for a term of 20 years, provided for an initial price to Cities Service of 8.4 cents per Mcf (16.4 psia). Concurrently, Pan American filed with its application a copy of a minimum price order of the State Corporation Commission of Kansas, issued December 2, 1953, prescribing a price for sales from the Kansas Hugoton Field of 11 cents per Mcf (14.65 psia).

Likewise, on November 16, 1954, Pan American tendered for filing with the Commission as its rate schedule a copy of its aforesaid contract with Cities Service, which contract was accepted by the Commission and designated Pan American's FPC Gas Rate Schedule No. 84. Certain supplements filed with the contract included a copy of the aforesaid Kansas minimum price order, which the Commission designated as Supplement No. 77 to Rate Schedule No. 84.

Pan American's certificate application was set for hearing on September 9, 1958, under the Commission's shortened procedure. However, the intervention by Cities Service made a contested hearing necessary. The hearing was commenced on November 4, 1958, and continuing on No-

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[2] The sale in question was being made on June 7, 1954, the date of the Supreme Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and the cut-off date under our Regulations issued in pursuance thereof.

vember 6, 1958, was recessed on that date to resume subsequently. No further hearing has been held.

At the hearing, all parties and staff counsel agreed that a certificate authorizing the sale by Pan American to Cities Service should be granted. Only one matter was contested, namely, what was the price on June 7, 1954, for this sale. Pan American took the position that the correct price for the sale was then 11 cents per Mcf as provided by the Kansas minimum price order, Supplement No. 77. Cities Service took the position that the correct price was 8.4 cents per Mcf, as provided by the parties' original contract, Pan American's Rate Schedule No. 84. This dispute, however, the parties would have eliminated by their proposal on November 5, 1958, at the hearing, to enter into a stipulation providing, in effect, that a certificate should be granted but that the grant thereof would not determine the price issue and was without prejudice to the rights of either of the parties with respect to this issue.

However, the examiner refused to permit such a stipulation, ruling in essence that the question of what was the price for this sale on June 7, 1954, was in issue herein; that it was necessary to resolve this issue in this certificate proceeding; and that the parties by stipulation could not remove this issue from the case. Accordingly, the examiner directed that the hearing should subsequently be resumed with respect to this issue.

Pan American's appeal herein is aimed primarily at the above rulings of the examiner. The company contends that the price dispute between it and Cities Service need not be determined in this case, and should not be, in view of the pendency of litigation respecting this matter in the Kansas courts. Pan American also alleges that assuming the issue is properly to be determined here, the examiner erred in refusing to issue subpoenas requiring the appearances of certain witnesses claimed to be needed to testify

respecting the price issue, in refusing to grant a longer continuance to permit the preparation of Pan American's case on the price issue, and in other respects.

Cities Service filed a response to Pan American's appeal on November 21, 1958. This company takes the position that Pan American introduced the price issue by its allegation in its application that the proper rate for the sale was 11 cents, which allegation Cities Service denies; that the courts have heretofore decided the disputed price issue adversely to Pan American; and that under such judicial decisions the correct rate for this sale is 8.4 cents and the Commission should so find and should not defer decision pending any further decision on this matter by the State courts.

We are of the view that it is neither necessary nor appropriate for the Commission to determine in this proceeding what is the price for the sale by Pan American to Cities Service, or to pass on the various issues related to this dispute. This case has been long pending and it is imperative that it be disposed of without further delay. The contract price of 8.4 cents per Mcf is justified under the requirements of public convenience and necessity. The price of 11 cents per Mcf provided for by the supplement to the contract is below the price permitted by our Statement of General Policy No. 61-1 issued September 28, 1960, and obviously is also justified under the standard of public convenience and necessity. The dispute between Pan American and Cities Service over the price for this sale is being litigated by the parties in the Kansas courts, and the matter may reasonably be left for disposition by the courts.

It is obviously desirable that this order include a provision that the Commission's action herein is without prejudice to whatever determinations may be reached by the courts or the Commission with respect to the dispute between Pan American and Cities Service concerning the price for this sale.

The Commission further finds:

(1) Pan American Petroleum Corporation, the applicant herein, is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and is therefore a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sale of natural gas by Pan American to Cities Service hereinbefore described, as more fully described in the application, as amended, is made in interstate commerce, subject to the jurisdiction of the Commission, and such sale by applicant, together with the operation of any facilities therefor subject to the jurisdiction of the Commission, is subject to the requirements of subsections (c) and (e) of Section 7 of the Act.

(3) Applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder.

(4) The sale of natural gas by Pan American, together with the operation of any facilities therefor subject to the jurisdiction of the Commission, is required by the public convenience and necessity, and a certificate therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) A certificate of public convenience and necessity is hereby issued authorizing Pan American to sell natural gas to Cities Service, and to continue to operate any facilities subject to the jurisdiction of the Commission used for such sale, as hereinbefore described and as more fully described in the application and exhibits in this proceeding, upon the terms and conditions of this order.

(B) This certificate is not transferable and shall be effective only so long as applicant continues the acts or operations hereby authorized in accordance with the provisions of the Act and applicable rules, regulations and orders of the Commission.

(C) The issuance of this certificate does not constitute a determination of what was or is the price for the sale by Pan American to Cities Service, and is without prejudice to whatever determinations may be reached on the dispute between Pan American and Cities Service concerning this matter, or the rights of the parties in regard to this matter.

(D) Pan American's appeal and motions filed herein on November 10, 1958, are granted to the extent hereinabove set forth, otherwise, they are denied. To the extent hereinabove indicated, the above described rulings of the examiner are reversed.

By the Commission.

/s/ J. H. Gutride
Joseph H. Gutride,
Secretary.